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In the
Supreme Court of the United States

October Term, 1994

MEMBERS OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL VALLEY REGION, IN THEIR OFFICIAL CAPACITY, AND EAST BAY MUNICIPAL UTILITY DISTRICT, A CALIFORNIA MUNICIPAL UTILITY DISTRICT,

Petitioners,

v.

COMMITTEE TO SAVE THE MOKELUMNE RIVER,

Respondent.

On Petition For A Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

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BRIEF OF AMICUS CURIAE STATES OF IDAHO AND SOUTH DAKOTA IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

The Clean Water Act states, "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). The question presented is:

Whether a State Agency, by taking steps consistent with the Clean Water Act to control acid mine drainage from an abandoned mine, become liable under the Act to obtain a permit for that pollution.

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INTEREST OF AMICI STATES

The sovereign States of Idaho and South Dakota have an interest in the proceedings sought to be brought before this Court by the Petitioners, Members of the California Regional Water Quality Control Board, Central Valley Region, ("California" or "Regional Board"). As a result of the Ninth Circuit decision, remediation of polluted abandoned properties by the amici States may be adversely affected.

Impacts of Ninth Circuit Decision to Amici States

Although the Ninth Circuit decision affects all sites where States perform remediation of pollution caused by others, abandoned mines are particularly difficult to remediate. Abandoned mines are a national problem and the costs to remediate them are enormous. One report indicates that it will cost between $32.7 billion and $71.5 billion to clean up approximately 557,650 abandoned mine sites nationwide. James S. Lyon et al., Mineral Policy Center, *Burden of Gilt* 3 (1993).

Because the costs of mine remediation are so high, most States do not have the financial ability to do a total cleanup of abandoned mining sites. Partial remediation, which results in a reduction of the discharge of pollutants to surface waters and a direct benefit to the environment, is often a necessary interim step until funding becomes available for further cleanup. As a result of the Ninth Circuit decision, such partial remediation by States is virtually paralyzed.

State of Idaho

The State of Idaho has the regulatory authority to perform remediation at abandoned sites pursuant to the Idaho Environmental Protection and Health Act, Idaho Code §§ 39-101 through 39-130 ("EPHA"). The EPHA permits the State to "terminate any nuisance, source of environmental degradation, cause of sickness, or health hazard" and to recover the expenses therefor. Idaho Code § 39-108(6). Acting pursuant to that authority the State has performed remediation at numerous mine sites, including those within or near the Bunker Hill Superfund Site. Of these actions,

because of budget constraints and the practical technology available to remediate sites, only partial remediation was performed at all sites. However, a substantial benefit to the environment has resulted from the partial remediation.

Remediation of abandoned mines has been and will continue to be an important component of the State of Idaho's remediation programs to protect human health and the environment. Because of the Ninth Circuit decision requiring the California Regional Board to obtain a National Pollutant Discharge Elimination System ("NPDES") permit for discharges from Penn Mine, thereby becoming liable to potentially treat the abandoned mine's pollution, the State of Idaho foresees that it will be less likely to fund or supervise remediation activities at abandoned mines that may result in the State of Idaho being required to obtain an NPDES permit. Further, the State of Idaho will be less likely to implement emergency actions, by itself, or in cooperation with the United States Environmental Protection Agency to address environmental problems associated with abandoned mines.

State of South Dakota

Mining in the Black Hills of South Dakota over the last century has resulted in a legacy of an unknown[1] number of abandoned, unreclaimed gold, uranium, pegmatite and bentonite mines. In an attempt to quantify the problem, South Dakota is initiating a comprehensive inventory and hazard assessment of abandoned mine sites in the Black Hills. Although the full extent of the problem has not been quantified, the problems caused by acid mine drainage from abandoned mines are known.

South Dakota has an abandoned mine reclamation fund that is to be used to reclaim and prevent pollution originating from abandoned mine sites. The State has not yet, on its own, taken action to reclaim abandoned mine sites or prevent

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[1]Although the number of abandoned mines on private lands in South Dakota is unknown, over 1,000 abandoned mine sites have been identified on federal lands within the Black Hills.

pollution from abandoned waste or tailings piles.[2] Unfortunately, the imposition of NPDES permitting requirements on State-conducted abandoned mine reclamation activities will effectively eliminate abandoned mine reclamation as a viable option for the State of South Dakota.

Typical remediation by the State at an abandoned mine site could involve the implementation of some best management practices, such as controlling runoff from the area, removing acidic materials, and plugging adits. However, once an NPDES permit is required for site discharges, treatment of the discharged water/effluent would likely be required to meet water quality limits that could be met only by implementing expensive treatment methods.

The truly prohibitive part of such treatment is that it is required in perpetuity: at an abandoned site, there is no industry or business that exists to treat the discharge throughout the finite life of the business. Instead, for the next several hundred or more years, the State would be required to maintain a treatment facility at the discharge point of an abandoned mine. It is this perpetual liability that makes the impact of the Ninth Circuit Court of Appeals decision so chilling to State regulatory activities.

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[2]The State has, however, taken an active role in working with the current mining industry to develop acceptable reclamation plans for abandoned mine sites. This remediation occurs as a result of the mining industry's current ownership of the involved property or, on occasion, as a result of a settlement of an environmental violation claim.

SUMMARY OF ARGUMENT

Congress has consistently recognized that it is important for States to take a strong role in carrying out federal legislation enacted to protect and improve the quality of this nation's environment. That Congressional intent is clearly stated in the Clean Water Act, 33 U.S.C. §§ 1251-1387, and is also evident in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675.

Holding a State liable under the Clean Water Act for pollution it had no responsibility for creating - simply because the State took action to protect the environment from the adverse impacts of that pollution - directly frustrates Congressional intent explicitly stated in that Act.

Treating a State as if it were any other owner/operator of pollution control structures under the Clean Water Act, when those structures were constructed by the State solely in its regulatory capacity to abate the impacts of hazardous waste flowing from abandoned property owned by another, has the potential for eliminating the protection from liability Congress included in CERCLA for State-funded regulatory cleanups. If the protections from liability built into CERCLA are removed by the imposition of liability on States under the Clean Water Act, the Congressional intent that States use their own funding, and not just federal monies, to clean up hazardous waste sites is thwarted.

ARGUMENT

I.

Congressional Intent That States Take A Strong Role In Efforts To Clean Up Their Waters Is Frustrated By The Ninth Circuit Decision

As stated by California in its Petition for a Writ of Certiorari,[3] there is no doubt Congress intended in the Clean Water Act for States to take a strong role in efforts taken to clean up their waters - both through regulatory actions aimed at forcing polluters to clean up their discharges to navigable waters, and through "self-help" regulatory cleanup actions, necessitated by failure of the polluters to take the required actions. "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

"The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical and biological integrity of the Nation's waters.' 33 USC § 1251(a)." *Arkansas v. Oklahoma*, 112 S. Ct. 1046, at 1054 (1992). Between the States and the federal government, the States are expected to be the principal actors in the abatement of water pollution. *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1220 (6th Cir. 1992). States have primary responsibility under the Act to take action to restore and maintain their waters. *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1429 (9th Cir. 1991).

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[3]The State of Idaho supports the policy argument advocated by the State of California as it relates to the liability of a State to obtain an NPDES permit solely as a result of remediation activities undertaken by a State to clean up pollution caused by others. The State of Idaho takes no position on part III of California's Petition for a Writ of Certiorari.

Holding a State liable under the Clean Water Act for pollution it had no responsibility for creating, based solely upon actions the State took pursuant to its regulatory authority to control the harmful impacts of the pollution on the States' waters, is counterproductive and frustrates the Congressional purposes of that Act.

II.

The Ninth Circuit Decision Has The Potential For Eliminating The Congressional Protections For State Governmental Cleanups Built Into CERCLA

Congress intended that the Clean Water Act and CERCLA work in conjunction to solve the hazardous waste cleanup problems of this country. *United States v. State of Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 922 (1994). However, the Ninth Circuit decision making the California regulatory agency liable under the Clean Water Act for the hazardous pollutants discharging from an abandoned mine directly conflicts with Congressional intent to protect States from liability for regulatory remediation performed pursuant to CERCLA.

> No State or local government shall be liable under this title [42 U.S.C. §§ 9601 et seq.] for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2). Absent the existence of reckless, willful, intentional or wanton misconduct, the State is not liable under CERCLA for actions taken to control the release of hazardous substances from property owned by another.

This CERCLA protection has been extended to pre-CERCLA governmental cleanups conducted pursuant to the Clean Water Act. *United States v. Skipper*, 781 F. Supp. 1106, 1111-1112 (E.D.N.C. 1991) (holding that the Coast Guard could not be held liable as a potentially responsible person under CERCLA for regulatory activities performed in conducting a pre-CERCLA response action pursuant to Section 311 of the Clean Water Act.)

In determining Clean Water Act liability, the Ninth Circuit relies, in part, on the district court determination that the California Regional Water Quality Control Board "owned and operated the Penn Mine facility." *Committee to Save Mokelumne River v. East Bay Util. Dist.*, 13 F.3d 305, 306 (9th Cir. 1993). The Regional Board's status as an owner/operator was not based on any claim of State ownership of the abandoned mine property or operation of the mine, but rather upon the Board's construction and operation of the pollution abatement structures.[4] Based upon this court-determined status of "ownership" and concomitant responsibility for the abandoned mine's continuing discharge of pollutants, the circuit court found the State agency was

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[4]The circuit court discussed the structures that make up the "Penn Mine Facility" and their purposes as follows:

> The facility consists of Mine Run Dam and the Mine Run Dam Reservoir surface impoundments, along with a series of other impoundments, drainage ditches, pipes, valves, culverts, and channels. The Mine Run Dam and most of the Mine Run Dam Reservoir are located on property owned by the District. A small portion of the Mine Run Dam Reservoir extends onto property owned by a defunct mining company.
>
> The facility was designed to capture contaminated surface water flowing through the site, and to contain and evaporate the water through a ponding and recirculation system, preventing the contamination from reaching the reservoir and river below.

Committee to Save Mokelumne River v. East Bay Util. Dist., 13 F.3d at 306-307.

liable as a point source discharger within the meaning of the Clean Water Act. The owner/operator status of the Regional Board at the Penn Mine facility is no more than exists at any CERCLA remediation site where a governmental entity constructs pollution control structures solely in its regulatory capacity.

One unfortunate result of the Ninth Circuit decision is that a State agency is now liable for pollution it had no responsibility for creating and - because of that liability - States will be hesitant to take future actions to control another's pollution.

An additional result of the Ninth Circuit decision is that an argument now may be made that future discharges from the pollution control impoundments that occur during the continued presence of the Regional Board at the Penn Mine site as an NPDES permittee make it liable pursuant to CERCLA. Once a State is regarded as an owner/operator of a pollution control facility, it may no longer be able to argue that the "release of a hazardous substance [is] generated by or from a facility *owned by another person*," thereby eliminating the liability protections of 42 U.S.C. § 9607(d)(2).

Any citizen, including a potentially responsible party, may now be able to thwart the protections for State cleanups that Congress purposefully built into CERCLA simply by taking a two-step attack at State-conducted CERCLA cleanups of property containing hazardous substances where discharges to surface waters continue to occur. The first step is to sue the State under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, alleging that the regulatory cleanup makes the State liable as an owner/operator for the pollutants discharging from pollution control structures the State built to reduce the adverse impacts of the pre-existing pollution. Once liability is established under the Clean Water Act, the second step is to sue the State as a potentially responsible party under CERCLA, alleging that the protections of 42 U.S.C. § 9607(d)(2) no longer apply because the State is now an owner/operator of a facility discharging hazardous pollutants.

Allowing the Ninth Circuit decision to stand may provide third parties the ability to use the Clean Water Act as a sword to eliminate the Congressional shield provided in CERCLA for State-conducted regulatory cleanups. Such a result directly interferes with Congressional intent that States use their own resources for regulatory cleanup of hazardous sites they have no responsibility for creating. *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1047 (2d Cir. 1985). Such a result directly conflicts with Congressional intent to protect States from liability when they perform cleanup "of a hazardous substance generated by or from a facility owned by another person." 42 U.S.C. § 9607(d)(2).

CONCLUSION

It is clear from the foregoing that the Ninth Circuit decision has the potential to adversely impact the pollution abatement programs of the States of Idaho and South Dakota. The decision also contradicts the Congressional intent of the Clean Water Act and CERCLA. For these reasons, the amici States request that the Court issue a writ of certiorari to review the important question presented in the petition presented by the State of California.

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